

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

In Re: Fluoroquinolone)	File No. 15MD2642
Products Liability Litigation)	(JRT)
)	
)	Minneapolis, Minnesota
)	July 25, 2018
)	2:50 P.M.
)	
)	
)	

BEFORE THE HONORABLE CHIEF JUDGE JOHN R. TUNHEIM
UNITED STATES DISTRICT COURT
(STATUS CONFERENCE)

Court Reporter: KRISTINE MOUSSEAU, CRR-RPR
1005 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Proceedings recorded by mechanical stenography;
transcript produced by computer.

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2:50 P.M.

(In open court.)

THE COURT: You may be seated. Good afternoon.
All right. This is multi district litigation number
15-2642, In Re: Fluoroquinolone Products Liability
Litigation.

Let's have counsel note appearances for today's
status conference. First for the plaintiffs who are here
in the courtroom --

MS. FLAHERTY: Good afternoon, Your Honor.
Yvonne Flaherty on behalf of plaintiffs.

THE COURT: Ms. Flaherty.

MR. RICHARDS: Good afternoon, Your Honor. Jason
Richards on behalf of plaintiffs.

THE COURT: Mr. Richards.

MR. SIMS: Good afternoon, Your Honor. Thomas
Sims for the plaintiffs.

THE COURT: Mr. Sims, good afternoon. Now for
the defendants here today?

MS. TESSIER: Good afternoon, Your Honor,
Michelle Tessier for the Bayer and Merck defendants.

MR. SOLOW: Good afternoon, Your Honor. Andrew
Solow for the Bayer and Merck defendants.

THE COURT: Good afternoon, Mr. Solow. All

1 right. Now on the telephone for plaintiffs? We got a
2 little interference there, start again.

3 MR. CORLEY: Yes, Your Honor. Good afternoon.
4 Daniel Corley, McGraff Law Firm, for the plaintiffs.

5 THE COURT: Mr. Corley.

6 MS. MORTON: Cathy Morton from Kizer & Black
7 Attorneys.

8 THE COURT: Ms. Morton, okay.

9 MS. GRIFFIN: Good afternoon, Your Honor. Katie
10 Griffin with Sill Law Group for plaintiffs.

11 THE COURT: Ms. Griffin.

12 MR. NIDEL: Good afternoon, Your Honor. Chris
13 Nidel on behalf of the plaintiffs.

14 THE COURT: Mr. Nidel.

15 MS. BARTON: Good afternoon, Your Honor. Kristen
16 Barton on behalf of the plaintiffs.

17 THE COURT: Ms. Barton, good afternoon. Okay.
18 Who else?

19 MR. ROBINS: Good afternoon, Your Honor. Bill
20 Robins here on behalf of the plaintiffs.

21 THE COURT: Mr. Robins, good afternoon.

22 MR. WOOL: Good afternoon, Your Honor. This is
23 David Wool on behalf of the plaintiffs.

24 THE COURT: Mr. Wool. Who else?

25 MS. LEE: This is Kathy Lee on behalf of

1 Plaintiff Dirk Nation.

2 THE COURT: All right. Ms. Lee.

3 Anyone else for the plaintiffs?

4 All right. For the defendants?

5 MR. SUFFERN: Good afternoon, Your Honor.

6 THE COURT: Go ahead --

7 MS. LESKIN: Good afternoon, Your Honor. This is
8 Lori Leskin.

9 THE COURT: Ms. Leskin, good afternoon.

10 MR. SUFFERN: Good afternoon, Your Honor.

11 Michael Suffern on behalf of Actavis Pharma, Inc., Teva
12 Canada and Cobalt.

13 THE COURT: All right.

14 MR. SACHS: Good afternoon. This is Matthew
15 Sachs from Arnold & Porter on behalf of the Merck
16 defendants.

17 THE COURT: All right. Anyone else?

18 Okay. We have the roster of everyone
19 participating today. Anyone on the phone can't hear us
20 well, please say so, and we will try to make arrangements
21 to let you hear better. So we have a proposed agenda for
22 today's status conference?

23 MR. SIMS: Yes, Your Honor.

24 THE COURT: Go ahead.

25 MR. SIMS: Thank you, Your Honor.

1 THE COURT: Mr. Sims.

2 MR. SIMS: Starting with the status of the
3 litigation.

4 THE COURT: Okay.

5 MR. SIMS: We show there are approximately 356
6 cases currently pending in the MDL in which one of the
7 Bayer entities is named as a defendant. I believe we had
8 four or so transfer in yesterday, so we're right around
9 360.

10 Of those, approximately 260 are Bayer only
11 meaning they don't name a Janssen entity as a codefendant,
12 and approximately 97 involve both Bayer and Janssen
13 entities.

14 THE COURT: All right.

15 MR. SIMS: With respect to the proceedings in
16 Philadelphia state court, as the Court is aware the Bryant
17 case is set for trial. I believe that setting is September
18 30th, and that does by all accounts appear to be a firm
19 setting.

20 The parties are just starting the process of
21 discussing the exchange of exhibit lists and deposition
22 designations and whatnot, but as I believe has been
23 previously shared with Your Honor, the actual trial judge
24 likely won't be assigned until the week before that trial
25 setting.

1 There are an additional three cases that have
2 been filed in Philadelphia state court. However, they were
3 filed much later after the Bryant case, and there are no
4 trial settings coming up in those anytime soon.

5 THE COURT: All right.

6 MR. SIMS: And then finally we included an item
7 on the agenda. Either today or tomorrow there will be a
8 stipulation of dismissal entered in one of the bellwether
9 cases. It's the Jerry Shepherd case, and that has been
10 agreed to by the parties. That comes on the heels of an
11 expert deposition witness taken in that case, one of the
12 plaintiff experts.

13 THE COURT: All right.

14 MR. SIMS: And that's it for the plaintiffs for
15 litigation update.

16 THE COURT: Mr. Solow, anything?

17 MR. SOLOW: Good afternoon, Your Honor. Just to
18 clarify, the jury selection in the Bryant case in
19 Philadelphia is set for Friday, September 28th, and trial
20 is set to begin on Monday, October 1st, and then in that
21 Shepherd case, that stipulation was filed today, and a
22 proposed order was submitted to the Court shortly before
23 the conference.

24 THE COURT: Okay. And it's true that we won't
25 know who the judge is until the week before?

1 MR. SOLOW: That is the -- I can't say it's
2 definitely true, Your Honor. That is sometimes the way it
3 happens. As Your Honor knows, our position is, if we are
4 going to have a *Daubert* hearing here, and Your Honor had
5 indicated you would be inclined to invite the state court
6 judge, we would ask Judge Younge who is the, quote unquote,
7 "team leader" in charge of those cases to see if a judge
8 could be assigned earlier to sit in on that.

9 THE COURT: All right. Good. Anything else?

10 MR. SIMS: Not on item one, Your Honor.

11 THE COURT: Okay.

12 MR. SIMS: If we could turn to item two. This I
13 believe is the first time we have reconvened since the
14 designation of the defendants' case-specific experts.
15 Following that designation, there has been a dispute that
16 has arisen between the parties. I would like to just
17 briefly summarize it, and then we have a proposal for the
18 Court.

19 I think defendants have something else in mind on
20 how to handle it, so I thought we would discuss that now.
21 As the Court is aware, the scheduling order in this case,
22 which is, the current version is the third amended pretrial
23 order order number 13, which is docket number 488,
24 envisions a two-phase expert process.

25 Phase I is for the parties to designate experts

1 with respect to general causation and liability, and that
2 has a discrete set of dates and deadlines associated with
3 it, and then phase II is the designation of so-called
4 case-specific experts. It has a separate trailing set of
5 deadlines associated with it.

6 We believe it's clear under that structure that
7 any expert who intends to offer any testimony with respect
8 to general causation or liability must have been designated
9 consistent with the deadlines set out for general causation
10 and liability. In fact, I think the key language from
11 third amended pretrial order number 13 states, "For experts
12 regarding general causation and liability," and then it
13 goes on to state the deadlines for that.

14 In defendants, when they designated their
15 case-specific experts, we noticed that almost every single
16 one of their experts had a substantial portion of their
17 report devoted to a fairly in-depth discussion of general
18 causation, and a few of those experts also addressed what
19 we would consider liability to the extent it addressed the
20 adequacy of the label for the product.

21 We believe that was improper under the Court's
22 scheduling order and that if they wanted an expert to
23 address general causation or adequacy of the label, it had
24 to be designated consistent with the Court's deadlines for
25 general causation testimony.

1 Defendants disagree. They believe that since
2 these experts were only designated in specific cases, not
3 in all cases, it was permissible for them to address
4 general causation. We would like to get this issue
5 resolved prior to the deadline by which the parties have to
6 file *Daubert* motions.

7 We feel it is an unfair burden to place on
8 plaintiffs to pursue *Daubert* lines of attack on these
9 witnesses when we think the foundational issue is, these
10 opinions shouldn't have even been offered by the experts.
11 So what we would propose is having this issue heard in
12 August. We could do a very --

13 I think the issue is very straightforward. It's
14 just an issue of perhaps many letter briefs of a few pages.
15 I think it is going to come down to what is stated very
16 clearly in the papers and how the Court wants to handle
17 that, and we would like that issue to be resolved in
18 advance of the September 7th deadline for filing *Daubert*
19 motions in case specific cases.

20 So we would request some time in August that the
21 Court hear that dispute.

22 THE COURT: Mr. Solow?

23 MR. SOLOW: Thank you, Your Honor. Mr. Sims
24 addressed some of our position, but I don't believe all of
25 it. Your Honor, third amended pretrial order number 13

1 specifically has mirror image language for the Avelox
2 bellwether cases and the Cipro bellwether cases, and that
3 language is, the quote, Disclosure of the identity of each
4 case-specific expert witness under Rule 26(2)(a) and the
5 full disclosures required by Rule 26(a)(2)(B) accompanied
6 by the written reports of those witnesses.

7 These witnesses, to be clear, are not addressing
8 the general causation *Daubert* opinion, challenge opinions
9 of plaintiffs' experts. These are the witness, the
10 case-specific experts that we will be calling in any one of
11 the bellwether trials. Certainly we never, having
12 submitted this order, the Court as a joint proposed order,
13 it was never our understanding that we needed to disclose
14 at the general disclosure stage any expert that we were
15 going to use throughout the entire litigation.

16 Certainly our position is, on the issue of
17 whether there was general causation on liability, as Your
18 Honor knows, we have filed *Daubert* motions challenging
19 plaintiffs' experts, but our position is, we're not
20 necessarily calling those witnesses in each and every trial
21 in this MDL or in any remand case.

22 So these are the experts. They are not
23 duplicative experts. They are, some experts are disclosed
24 in some cases and not others, and that's the specific slate
25 of experts that will be in those cases. So that's we

1 believe consistent with both the letter and spirit of third
2 amended pretrial order 13.

3 Second, Your Honor, Mr. Sims noted that they are
4 raising general causation. I do think it's quite ironic,
5 Your Honor, that our experts are -- these disclosures were
6 filed at the same time as plaintiffs' experts' disclosures
7 were filed -- sorry -- after plaintiffs filed their
8 case-specific experts where those experts are also
9 sometimes addressing general causation by adopting the
10 opinions of other general causation experts, like Dr. Smith
11 and Dr. Simpson, and then setting forth their opinions.

12 So our reports, which come later in the schedule,
13 are rebutting those opinions. It's really, frankly, not
14 understandable how our case-specific experts can address
15 the causation issue without taking on the experts that they
16 have been designated by plaintiffs who are relying on
17 general causation points.

18 By the nature of our experts' opinions, they have
19 to address whether there is general causation principles
20 and then work their way down to the case-specific opinions.
21 Likewise, the labeling opinion that any of our
22 case-specific experts are only discussing the label as it
23 applies to that plaintiff at that point in time, again
24 consistent with the disclosure of the expert that will be
25 testifying in that individual bellwether case.

1 In terms of scheduling, if Your Honor wants
2 briefing on this, I also find it a little odd that
3 plaintiffs' view that they need to raise this before they
4 raise *Daubert* issues. To the extent they're complaining
5 that these are general causation opinions or general
6 liability opinions, they didn't file any *Daubert* motions
7 against our timely disclosed general causation and general
8 liability witnesses.

9 So to the extent they now want to raise *Daubert*
10 challenges on these experts, we've got a schedule. That
11 briefing calls for briefs filed on September 7th for both
12 sides. As Your Honor knows, this schedule has slipped
13 quite a bit. We've got quite a busy month of August, as we
14 did for July, of going back and deposing back and forth all
15 these experts.

16 So to the extent that there really needs to be
17 briefing on this, we think this is properly motions to
18 challenge our experts, and they should be filed on
19 September 7th, which is the due date for those motions, and
20 that actually is under PTO 16, which ultimately then
21 entered a different scheduling order.

22 THE COURT: Do you have anything else?

23 MR. SIMS: Just very briefly, Your Honor. There
24 is a very significant difference between a case-specific
25 expert saying I agree with the opinions of Dr. X of

1 defendants regarding general causation. We don't have an
2 issue with that. That's what our experts did. I think you
3 have to do that. That's the nature of the beast.

4 Very different from that witness then spending
5 two hours talking about 20 different studies and the method
6 for establishing general causation, essentially echoing
7 what their own general causation expert has done. In this
8 case, they have a case-specific neurologist who addresses
9 general causation at length, and they have a so-called
10 general causation neurologist who addresses general
11 causation at length.

12 We don't think that's proper. We don't think
13 that's what was intended here, and we think it needs to be
14 addressed prior to *Daubert*. It is true we did not bring
15 *Daubert* motions, but they have a wide background of experts
16 in their case-specific cases, including for example a
17 pulmonologist who addresses this issue.

18 And we think that may not be appropriate and want
19 to look at that hard under *Daubert*, but we don't think we
20 should even have to put in and devote those additional
21 resources.

22 THE COURT: Just one second.

23 Okay. Go ahead. Sorry.

24 MR. SOLOW: Your Honor, I would just refer back
25 to pretrial order 13, the third amended version of it.

1 Again, plaintiffs have to disclose their experts first. We
2 have been working almost blind not knowing who plaintiffs
3 were going to disclose in any one of an individual case.
4 They've got the burden of proof. We went ahead and upon
5 receiving their reports finished our reports and disclosed
6 them.

7 This is it, right? Unless we're going to have an
8 opportunity to supplement down the road whenever these
9 trials are, I don't know how the trial is going to play
10 out. I don't know who the plaintiffs are going to call.
11 We have properly disclosed the experts that we would call
12 in any case-specific case. So depending on if there is a
13 pulmonology issue in an individual plaintiff, we disclose
14 that expert in that individual case.

15 Again, I'm not seeing a distinction here between
16 a motion to exclude our experts before they're making a
17 *Daubert* challenge. If they believe these are improper
18 opinions we've got a schedule here. It just seems the idea
19 that we're going to set up a briefing schedule in advance
20 of the agreed schedule for these types of motions is just
21 going to wind up burdening us.

22 As we know we're going to be filing case-specific
23 *Daubert* motions, we're going to be burdened with responding
24 to these motions, finishing the expert discovery of our
25 experts. There are depositions scheduled throughout that

1 week of plaintiffs' and defense experts and filing these
2 motions on September 7th. I don't understand the urgency
3 for the matter.

4 MR. SIMS: Your Honor, I don't think this is a
5 complicated issue. I think your order is unambiguous. I'm
6 happy to submit right now based on what we have argued and
7 just your simply reading the two orders together. The
8 case-specific order says very clearly, pretrial order
9 number 16: All general causation and liability expert
10 discovery shall proceed pursuant to the existing deadlines
11 as set forth in third amended pretrial order number 13.

12 If they wanted their case-specific to address
13 general causation, they should have followed pretrial order
14 number 13.

15 THE COURT: So if the Court orders letter
16 briefing on this issue, how soon can you have it in?

17 MR. SIMS: We can have it in within five days,
18 Your Honor.

19 THE COURT: I'm thinking at this point I don't
20 want a hearing on this, but I might want to order some
21 briefs to look at the issue.

22 MR. SOLOW: Your Honor, we would ask for seven to
23 ten days for a responsive brief. Obviously I think we may
24 have to put in more than a letter because we're going to
25 need to show the expert reports that our case-specific

1 experts are responding to. So at this point until I see
2 what their filing is, I can't necessarily say how many
3 pages we're going to need.

4 We're looking at, I believe now we're left with
5 four sets of -- there are four bellwethers remaining. I'll
6 address this in a moment, Your Honor. So I'm not sure
7 which experts and how many experts I'm going to need to
8 respond on.

9 THE COURT: How many experts are involved with
10 your concern?

11 MR. SIMS: All but one of them, I believe, Your
12 Honor. All the case-specific experts save for one, I
13 believe.

14 THE COURT: Which is how many?

15 MR. SIMS: I believe it's five, Your Honor.

16 THE COURT: So well, let me look at this in
17 writing. I'm sorry you have to do some briefs here, but we
18 will look at it. I don't think at this point I need a
19 hearing on it. We'll get it resolved as quickly as
20 possible. If you can have your --

21 I won't make it necessarily a letter brief. You
22 can do a brief on it. Let's do it within a week for you
23 and then another ten days to respond, and we'll get it
24 resolved right away.

25 MR. SIMS: Thank you, Your Honor.

1 MR. SOLOW: Thank you, Your Honor.

2 THE COURT: Okay. All right. So the *Daubert*
3 hearing, do the parties wish to be heard on that?

4 MR. SOLOW: Yes, Your Honor. We had filed a
5 submission and two conferences ago raised it with Your
6 Honor. Mr. Robins had asked for an opportunity to put in a
7 short letter brief in opposition to the need for a *Daubert*
8 hearing. That was submitted, along with the opposition to
9 the *Daubert* motions which have now been filed.

10 That motion is fully briefed. That reminds me.
11 I do have something to hand up to the Court. We have
12 prepared hyper linked copies of our briefs to the case law
13 and all the exhibits. So I'll hand those up at the next
14 opportunity. I've got a copy for the plaintiffs as well.

15 But, Your Honor, we think for the reasons we set
16 forth originally with Dr. Smith and Dr. Simpson this is
17 appropriate now to have a hearing on those two experts and
18 their general causation opinions. We believe there is, for
19 the reasons we've set forth in our reply brief in response
20 to the opposition, there are several issues that are worthy
21 of the Court having a *Daubert* hearing.

22 These are going to be the opinions that are going
23 to be relied on. As Mr. Sims said, their case-specific
24 experts all cite back to Dr. Smith and Dr. Simpson, and I
25 think it's important that the Court has a full opportunity

1 to hear these experts before deciding whether some of these
2 cases can proceed.

3 THE COURT: All right. And what are you
4 proposing for length of a hearing?

5 MR. SOLOW: Your Honor, plaintiffs have not filed
6 any challenges to our experts, so we just think
7 cross-examination of their experts is sufficient. We think
8 this can be done in a single day. We would propose -- give
9 me a second, Your Honor.

10 THE COURT: Mm-hmm.

11 MR. SOLOW: The dates that seem to work, Your
12 Honor, at least for on our end around the Jewish holidays,
13 as well as the Bryant trial that has been mentioned, would
14 be the end of the second week of September. So the 12th
15 through the 14th or early the following week, Monday the
16 17th.

17 THE COURT: Okay. All right. Go ahead.

18 MR. RICHARDS: Good afternoon, Your Honor. Jason
19 Richards. This may be a moot point, but I'll bring it up
20 anyway.

21 THE COURT: Sure.

22 MR. RICHARDS: We filed our brief in opposition
23 to live testimony. We would reiterate for the reasons
24 noted in our brief that we don't think it's necessary. I
25 know the Court stated earlier it was inclined to do so, and

1 that's certainly within the Court's discretion to have live
2 testimony, but at the end of the day, it's plaintiffs'
3 burden to prove by a preponderance of the evidence that our
4 expert's testimony should be admitted. We are not seeking
5 live testimony.

6 So due process concerns from our standpoint
7 aren't there. So the question really becomes, is the case,
8 the record adequately developed and sufficient and have the
9 defendants had an adequate opportunity to address the
10 issues they want to raise in the motion to exclude?

11 At this point, the defendants have had full day
12 deposition testimony, both of our experts, so seven hours
13 for each expert. They were granted additional extra pages
14 for which to try to exclude our experts. The Court has
15 been provided with the complete deposition testimony of
16 Dr. Simpson and Mr. Smith.

17 So in addition to that, there are only
18 approximately, I think Mr. Sims said, 350 cases pending in
19 this MDL. The economics of requiring essentially a mini
20 trial on expert testimony doesn't make sense in this case.
21 In our brief, we cited to Judge Goodwin in the mesh
22 litigation. There are 60,000 plus plaintiffs in that --
23 those MDLs alone.

24 Judge Goodwin has disposed of all the *Daubert*
25 challenges without live testimony in a single case. Here

1 there are approximately 350 plaintiffs. If we are
2 foregoing our right or opportunity to have due process and
3 have a live *Daubert* hearing, I think that changes the
4 equations.

5 The economics here don't make sense necessarily
6 to have a full, live *Daubert* hearing two to three days,
7 which is essentially a mini trial because they have had
8 seven hours. That's one day, and now they want two or
9 three days more for two witnesses. *Daubert* did not intend
10 mini trials on the admissibility of expert witnesses.
11 That's *Kumho Tire*. Okay?

12 It's an unnecessary expense is what we contend,
13 and we still maintain that. That said, I'm cognizant of
14 what the Court noted earlier, that it was inclined to do
15 so. If the Court is inclined to do so, we would request
16 that the Court limit the *Daubert* hearing of live testimony
17 to a half day for each witness.

18 So you're still looking at almost two days total
19 based on the deposition testimony they have had, a full
20 day, plus another half day of a *Daubert* hearing. So we
21 would ask the Court to limit it to a half day for each
22 expert instead of two to three days. It just goes against
23 *Kumho Tire*. It is an unnecessary expense.

24 It takes time and a lot of money to get these
25 experts and schedule them to be here. So that is what we

1 would request, Your Honor. We don't think it's necessary,
2 but in the event it is, we ask that it be limited.

3 THE COURT: Mr. Solow, timing?

4 MR. SOLOW: Sorry, Your Honor. There appears to
5 be a disconnect. I thought I just said that we think a day
6 is sufficient, which is a half day for each of the
7 witnesses. I don't know where the two or three days comes
8 in or a mini trial. It's a day.

9 I can't speak to the merits of the mesh
10 litigation or the underlying science there, but clearly
11 with the number of cases that are pending here, as we have
12 set forth in our moving papers and again in our reply,
13 there are several different types of peripheral neuropathy.
14 We think this certainly can be a proper way of excluding
15 some of these cases going forward where there is no basis
16 for science.

17 Likewise in plaintiffs' opposition, there was
18 several statements about mischaracterizing Dr. Simpson's
19 and Dr. Smith's testimony, so we think a live hearing is
20 the proper way to support Your Honor's ruling on that.
21 Before I forget, if I may, Your Honor, I'll pass up the
22 thumb drive with the hyper linked exhibits.

23 THE COURT: Okay.

24 MR. SIMS: I would just state, Your Honor, in
25 Levaquin I, the Court didn't have one, didn't have a live

1 *Daubert* hearing. Several courts here and judges in this
2 district don't have them in much bigger litigations. If
3 the record were somehow incomplete, which they do not claim
4 it is, had they not had a full day with each expert, had
5 they not been granted additional briefing to exclude our
6 witnesses, it may be different, but that's not what we have
7 here.

8 They're not saying anything is new. They're not
9 saying the record is incomplete. So we don't think it's
10 necessary, but again, if he's talking about one day total,
11 a half day for each, if the Court is inclined to have a
12 live hearing, then that's what we would suggest.

13 THE COURT: Okay. All right. I think we should
14 have a hearing. I think it would be helpful to the Court,
15 and we could possibly include a Philadelphia judge, if
16 there is a judge assigned. That 12th through 14th time
17 frame probably works okay for me, but I think I need to
18 probably wait until Heather is back to make sure. She is
19 back next week.

20 If we can delay setting the date for a week? Are
21 there problems with any of those dates for the plaintiffs?

22 MR. SIMS: There might be, Your Honor.

23 THE COURT: Okay.

24 MR. SIMS: Dr. Smith has a little more
25 flexibility. Dr. Simpson, unfortunately, is a specialist

1 in an academics institution. His schedule books up months
2 in advance. So I can consult with him as soon as we're
3 done today, but I just don't know if those dates would be
4 viable or not. The more dates I have, obviously the
5 better.

6 I apologize. I missed just a moment ago. I
7 think the Court said just a moment ago the 12th through the
8 14th now?

9 THE COURT: I think that was what was suggested
10 by Mr. Solow.

11 MR. SIMS: Okay.

12 THE COURT: One of my problems is, I do have a
13 trial scheduled starting on the 4th of September that's
14 about a nine-day trial. I don't know if it's going to go
15 for sure or not. It's been hanging out there for a long
16 time, although I understand there are some settlement
17 discussions go on.

18 So I don't know at this point.

19 MR. SIMS: Set for the 4th?

20 THE COURT: Starting the 4th. Let's look at
21 those three days here. So I think that we could probably
22 do either the 13th or the 14th. I have to postpone the
23 trial for a day or the trial may go away. The 12th would
24 be a problem for me.

25 MR. SIMS: I will inquire about those specific

1 dates.

2 THE COURT: So the 13th or 14th. Let's see. The
3 following week, Jewish holiday on Tuesday.

4 MR. SOLOW: Right. So, Your Honor, if Your Honor
5 was available, we could do the end of that week, perhaps
6 the 20th or the 21st, again if that helps plaintiffs with
7 their scheduling of Dr. Simpson.

8 MR. ROBINS: Your Honor, this is Bill Robins.
9 I'm not available on the 21st. I have a hearing in the
10 Lipitor JCCP that day.

11 THE COURT: I'm only available half of the 20th.
12 What about the 19th, which is the Wednesday?

13 MR. SOLOW: So I believe the Jewish holiday is
14 the evening of the --

15 THE COURT: The Tuesday?

16 MR. SOLOW: Of the Monday until sundown on the
17 Tuesday, so it may be tough for people to get out here for
18 a Wednesday morning.

19 MS. LESKIN: And to clarify, Your Honor, this is
20 Lori Leskin. Yom Kippur is actually on the Wednesday. It
21 is Tuesday night to Wednesday night.

22 THE COURT: Oh, it is Tuesday night to Wednesday
23 night?

24 MS. LESKIN: Yeah.

25 THE COURT: That makes Thursday a problem, too.

1 MR. SOLOW: Apparently.

2 THE COURT: Monday of that week, the 17th?

3 MR. SOLOW: I originally had said I thought the
4 17th was a clear day for us.

5 THE COURT: It seems to me that either the 17th
6 or the 21st that week we could fit it in.

7 MR. SIMS: Mr. Robins isn't available on the
8 21st.

9 THE COURT: Not available on the 21st. So 17th?

10 MR. SIMS: Let me take those three days, and we
11 will see what we can do with them. Thank you, Your Honor.

12 MR. SOLOW: Thank you, Your Honor.

13 THE COURT: All right. Sealing?

14 MR. SOLOW: Your Honor, this is a motion for, a
15 joint motion for continued sealing with respect to the
16 *Daubert* challenge of Dr. Plunkett, her expert report and
17 some deposition testimony, which includes company documents
18 and references to internal confidential matters. It's a
19 joint submitted motion to have those remain under seal, and
20 that has been submitted to Your Honor with a proposed
21 order.

22 THE COURT: All right. We'll sign that right
23 away.

24 MR. SOLOW: Thank you, Your Honor.

25 THE COURT: Okay. Let's see. All right.

1 Bellwether, do you want to talk about that now? Go ahead.

2 MR. SOLOW: Thank you, Your Honor. Let me make
3 sure I have the screen working properly here. Okay. So if
4 Your Honor recalls --

5 MR. SIMS: I'm sorry, Your Honor. I apologize to
6 interrupt. We actually have an objection to use of the
7 slides. These are the slides we were provided previously
8 from April, and it looks like maybe there is some updated
9 information on these slides. I don't object to their using
10 it, but I think we need to have been provided a copy prior
11 to the start of today's hearing. We submitted some things
12 in writing in response.

13 THE COURT: How much has changed, Mr. Solow?

14 MR. SOLOW: I am sorry. Say that again, Your
15 Honor?

16 THE COURT: How much has changed?

17 MR. SOLOW: We have tried to update this through
18 the data through July 18th. This is a constantly moving
19 target as more cases become PFS sufficient. Your Honor,
20 for the purposes of this, I'm happy to move through just
21 not referring to the specific numbers I think generally.

22 It was really just a reminder of the Court of
23 where we are previously. So if I may, Your Honor, you
24 recall the initial bellwether pool called for twelve cases,
25 eight Avelox only, peripheral neuropathy only cases, four

1 per side and four Cipro cases. I think this all is a,
2 you'll see, Your Honor's background to what I get to at the
3 end is comparing what plaintiffs have come back with what
4 our joint proposal is.

5 One of the big things plaintiffs have pointed
6 out, Your Honor, is that this second bellwether pool if
7 it's going to go forward, it should be open to all cases.
8 As Your Honor may recall, the original pool were cases that
9 were assigned to the MDL as of April 21st, 2016, and met
10 several other criteria.

11 That resulted in a pool of approximately 30
12 cases. As I will show Your Honor, we have in our view
13 worked that pool pretty well over at this point in time.
14 There is a substantial number of cases, overwhelming
15 majority of the cases, that were not eligible for selection
16 in the first bellwether pool.

17 At this point, we don't think it's appropriate if
18 we're looking for representativeness, which is certainly
19 something that plaintiffs in the first page of their
20 opposition to the whole process have set forth here, to be
21 going back and drilling further into the first 30 cases
22 that were filed when there is over 300 now in the MDL.

23 As I said, Your Honor, one of the other things we
24 looked at originally when we made our proposal for a second
25 bellwether pool was the lack of representation of cases

1 represented by counsel that were not in the plaintiffs'
2 steering committee. Again, Your Honor, if I may just
3 grab -- one second. Plaintiffs' filing document number 633
4 on June 6th was the PFC's memorandum in response to our
5 plan for a second round of bellwethers.

6 The plaintiffs indicated that our plan is, quote,
7 "unduly burdensome and will fail to result in the selection
8 of representative cases that will assist the Court and the
9 parties in enhancing the prospects of settlement or
10 resolving common issues."

11 Your Honor, we certainly don't see how that goal
12 can be achieved if the plaintiffs steering committee has
13 the only representative cases in the pool. Certainly there
14 are non PSC members that are calling into these conferences
15 that have cases in the litigation and they should be
16 represented.

17 That also leads us, Your Honor -- we mentioned
18 this last time. The Sill Law Group has the most cases in
19 this MDL, currently 80 cases, give or take. I know
20 Mr. Sims hasn't seen these latest numbers. The bottom line
21 is, that firm which is the largest representative plaintiff
22 firm in this MDL had no eligible cases in the first
23 bellwether pool.

24 I think Your Honor indicated at the time we
25 presented our proposal initially for a second bellwether

1 pool that it made sense under the notion of
2 representativeness to have the firm with the most cases
3 actually be represented in a bellwether process.

4 Your Honor, if I can walk you through quickly,
5 this highlights where we are now from the initial
6 bellwether pool. As Your Honor knows, we have selected
7 only ten cases because we didn't have enough Cipro cases in
8 the initial pool.

9 One of the cases properly under the pretrial
10 order was dismissed by the plaintiffs during, right before
11 fact discovery -- actually during fact discovery on July
12 27th of last year. So pursuant to the pretrial order 13,
13 we went ahead and replaced that with the Shepherd case, and
14 since that time, the parties have then -- I'm now on slide
15 9, Your Honor -- proceeded to agree that some of these
16 cases were more ripe for statute of limitations summary
17 judgment motions, while the others would remain in a
18 bellwether pool.

19 Since that point in time, Your Honor, as you can
20 see, two more cases were voluntarily dismissed by the
21 plaintiffs prior to expert discovery. Certainly we were
22 willing to take those dismissals without costs being
23 incurred, even though we did the fact discovery in those
24 cases, but plaintiffs recognized there was a hurdle there
25 on expert discovery.

1 The Shepherd case, which was mentioned earlier in
2 this conference, was just dismissed this week. Based on
3 proceeding through expert discovery, the expert decided
4 that it probably wasn't right to move forward with that
5 case. Your Honor, that leaves us with four cases right now
6 in the pool, which is what we were ultimately were supposed
7 to try.

8 As Your Honor will notice, there are no defense
9 cases remaining in that pool. If in fact the bellwether
10 process is supposed to be representative, we should have an
11 opportunity to have these cases put into a pool, worked up
12 and seen where they're at.

13 Your Honor, I imagine we're going to hear about
14 the small sample size and how this process may have worked
15 because all the defense cases were ultimately dismissed and
16 that we may be cherry-picking what plaintiffs would
17 perceive as bad cases. While I also did hear earlier, Your
18 Honor, that there are only 300 some odd cases here.

19 So if in fact these cases once they get a light
20 shined on them and we begin to work them up, they are being
21 voluntarily dismissed, we think it's appropriate that we
22 get an opportunity to work more of those up and not just
23 have cases on the docket that are not moving forward.

24 With that, Your Honor, this is where we ended
25 prior to receiving plaintiffs' proposal. I mentioned that

1 all the cases now in the first bellwether pool are
2 represented by the PSC. There are no defense picks left on
3 the Avelox cases. Remember based on the size, there was
4 only a single Cipro case. Both parties selected it.

5 Plaintiffs also pushed back on our notion to
6 continue with peripheral neuropathy only cases. I'll note,
7 Your Honor, that plaintiffs had a short form complaint
8 obligation to indicate whether they were proceeding under
9 just peripheral neuropathy only claims or other tendon
10 injuries, including tendon claims or other claims.

11 Your Honor, we think that at this point in time
12 it makes no sense to be proceeding with discovery in cases
13 where in the pleading stage people have taken the position
14 that they are already proceeding on other injuries.
15 Certainly when you work up a case, we can see what's in the
16 file, but at least we now know that they are not seeking
17 damages based on other injuries. We think that is the
18 appropriate way to go.

19 Likewise, Your Honor, there is a short form
20 complaint obligation indicating which drug, which
21 medication, plaintiffs are seeking to hold liable. Again,
22 when we work up the cases, we certainly see there are other
23 antibiotics, other Fluoroquinolone usage, but it is we
24 think the wiser course to choose a case to proceed where
25 plaintiffs have already declared that they are not seeking

1 liability under any other Fluoroquinolones.

2 Likewise, Your Honor, we think we need a more
3 robust pool because there are no cases involving the post
4 August 2012 labels. We think that it is appropriate to be
5 able to have bellwether cases that challenge some of the
6 more subsequent labels in this case, and then I mentioned
7 the representation of other plaintiffs' firms.

8 Moving forward, Your Honor, I have set aside here
9 on slide 12 a side-by-side comparison of our proposed
10 criteria, which we presented at a case management
11 conference, two case management conferences ago, and this
12 is the proposal that the plaintiffs have come back with,
13 Your Honor.

14 As you will see, we wanted 24 bellwether cases,
15 and plaintiffs have come back with 10. We certainly don't
16 think having been through a process that called for 12 and
17 we only got to 10 and we're now down to 4, we think that is
18 starting certainly too low. I have addressed plaintiffs'
19 concern about including in all cases in the inventory that
20 just simply mean Bayer regardless of whether they are
21 peripheral neuropathy only or other Fluoroquinolone
22 products.

23 That said, we thought, Your Honor, that this plan
24 should start immediately. Plaintiffs have come back and
25 indicated that they think there is a benefit in selecting

1 cases after summary judgment rulings from Your Honor,
2 including the general causation *Daubert* rulings and any
3 case-specific motions, including the SOL motions.

4 Your Honor, based on that, I think that's a valid
5 concern, and we're willing to submit a revised proposal.
6 In terms of timing, we think it's appropriate for the Court
7 to set forth the criteria now based on what the Court
8 perceives is the right number. We can work with the
9 plaintiffs and draft up a Case Management Order and allow
10 the parties an opportunity to begin to screen these cases
11 and then wait for any summary judgment rulings to actually
12 make the selections.

13 So we're willing to compromise on that position
14 that plaintiffs have set forth. Plaintiffs' other big
15 pushback on our proposal was the inappropriateness of
16 trying to make sure that the pool was populated with
17 certain number of cases from representative plaintiffs
18 steering committee firms or non plaintiffs committee firms.

19 Your Honor, we certainly think with the Cipro
20 cases with the limited pool of cases that there are, we're
21 willing to forego that and compromise on the Cipro cases to
22 make sure that we've got sufficient numbers. Right now we
23 only have one that is moving forward, but certainly with
24 16, which is our proposal of 8 Avelox cases per side,
25 that's an ample opportunity for both sides to have, be

1 required to submit cases from the non plaintiffs steering
2 committee firms, again to achieve the goal set forth by the
3 plaintiffs steering committee of having a selection of
4 representative cases.

5 Likewise, we do feel that it's appropriate that
6 The Sill Firm, which has over 25 percent of the litigation,
7 is required to participate in this pool and not just by
8 having defendants select cases, but also to have that be
9 part of the plaintiffs' selection.

10 Thank you, Your Honor.

11 THE COURT: All right.

12 MR. SIMS: Thank you, Your Honor. I'm trying to
13 work my way through the revisions that were made by defense
14 counsel, and I may have a question for Mr. Solow, with the
15 Court's indulgence.

16 Just so I understand the proposal, you have
17 here -- Your Honor, is it all right if I ask Mr. Solow for
18 clarification?

19 THE COURT: Yes.

20 MR. SIMS: You have in page 13 of the Power Point
21 16 Avelox, at least 3 from non PSC firms, 8 chosen per
22 side. Does that mean each side chooses 3 non PSC cases?

23 MR. SOLOW: That's correct, Your Honor.

24 MR. SIMS: And each side chooses two cases from
25 The Sill Firm?

1 MR. SOLOW: Correct. So that would allow eight
2 Avelox cases per side, which would allow the other PSC firm
3 members to include up to three cases, and again they could
4 certainly include more cases from Mr. Sill or from the non
5 PSC. These would just be minimum requirements to make sure
6 there is a representative nature and component to the
7 Avelox cases.

8 MR. SIMS: Your Honor, my initial thought in this
9 is that it seems like Bayer is open to further discussion
10 and thought about this, and again, we have just seen this
11 revised proposal -- I'm going to address their arguments,
12 but at the end of the day there may be some benefit to us
13 talking some more.

14 One of the things that jumps out at me from this
15 and from their previous submission is that there seems to
16 be quite a bit of obsession about which firms are
17 representing these bellwether selections, which is quite
18 anomalous to my experience in any almost every other MDL.
19 Generally courts want to make sure cases are representative
20 of the issues in dispute.

21 So, for example, Bayer has talked about whether
22 or not there is a, quote unquote, "confirmed diagnosis" or
23 whether or not the label was pre or post August 2012.
24 Those are substantive issues within these cases. Whether
25 or not a lawyer represents one of the bellwethers, I don't

1 see the substance behind that.

2 The PSC is charged with the obligation of
3 representing all firms and all plaintiffs, and that's what
4 we have been doing. As soon as we start talking about non
5 PSC versus PSC, frankly, you know, that can create some
6 real tension on the plaintiffs' side because these firms
7 aren't members of the plaintiffs' side, and that creates
8 administrative hurdles in handling these cases.

9 There has not been a single showing by Bayer why
10 these cases from non PSC or from The Sill Firm are or are
11 not representative. I don't understand the basis for them
12 drawing that distinction. I'm not sure what the goal there
13 is. They haven't made any showing on how these are
14 overrepresentative or underrepresentative.

15 I also want to miscorrect any potential
16 misimpression that these other firms haven't been involved
17 up to this point. As I shared with the Court previously,
18 The Sill Firm in particular has been vital in the
19 preparations and in the participation of the work in this
20 case. They have appeared at depositions and taken them or
21 defended them.

22 They were integral in the drafting of our omnibus
23 response on the *Daubert* issue. They are playing a role
24 because they are a member of the PSC, even though they
25 don't have a bellwether case. So these firms are

1 participating in this process. I don't think we need to
2 have these arbitrary categories that, frankly, are
3 completely divorced from the underlying issues that the
4 parties are going to sit down and grapple with when it
5 comes time to trying to reach some resolution.

6 If there is some underlying concern here that we
7 need to bring in The Sill Firm explicitly because there is
8 some concern about them not being part of overall
9 discussions about settlement or resolution of the cases,
10 those discussions are not going on. Bayer has shown no
11 interest in that. So I don't understand what the
12 underlying aim or goal here is.

13 The timing is potentially something that I think
14 plaintiffs could accept. As we said in our written
15 response, we don't have an issue with the concept of the
16 second bellwether pool, but our three primary concerns are:
17 The categorization that is being used here and particularly
18 the focus on which firm brought it; the timing of it, which
19 is partially addressed here.

20 The other thing that occurred to me as I heard
21 Mr. Solow's discussion of the *Daubert* hearing is, there is
22 apparently a desire to carve out certain types of
23 peripheral neuropathy that seems to be the subject of their
24 *Daubert* motions. I think we should probably have that
25 resolved by the Court.

1 If we're going to be carving out types of
2 peripheral neuropathy, we should wait for the summary
3 judgment ruling and the ruling on the *Daubert* issue before
4 we actually get down to choosing these cases. The other
5 issue obviously that we had raised a concern with is the
6 number of cases. We do feel 24 is excessive, given that we
7 are now talking about a second wave of discovery of
8 bellwether choices.

9 We have already gone through ten, and although
10 Bayer may not feel this way, there is actually quite a bit
11 of utility to having cases being dismissed through this
12 process. This is educating all of us as lawyers as to
13 these cases and the merits of the cases, and I think that
14 is the end goal of the bellwether process, and we have
15 certainly done that even though we only had ten cases.

16 So I think given the size, 350 cases, but really,
17 and that's the key here, Your Honor. It's not 350 cases.
18 Let's take, for example, the first pool. We actually chose
19 from a pool of 34 cases. We chose 10 cases from 34
20 eligible cases. In doing so, we ignored 120 other cases
21 that had been on file at that time.

22 When we make these arbitrary distinctions we end
23 up getting a very non representative pool. That's why
24 plaintiffs want to open it up to make sure we're not
25 talking about representing 30 cases. Those cases that

1 allege, let's call it, PN plus other injuries, that's a
2 third of the cases pending in this MDL.

3 What Bayer is proposing that we go through two
4 phases of bellwether discovery for 34 plaintiffs and not
5 touch a single one of those 33 percent of the cases pending
6 before Your Honor. We think that just doesn't make a lot
7 of sense. Again, we think there may be some compromise
8 here.

9 There is going to be some remaining disputes
10 potentially about the numbers, but I see some elements that
11 may be acceptable here, but again, we were just handed this
12 a few minutes ago.

13 THE COURT: Mr. Solow?

14 MR. SOLOW: Thank you, Your Honor. Let me
15 address some of these points, not necessarily in the order
16 that were brought up by Mr. Sims. First, I think we're in
17 agreement in terms of waiting for the actual selections to
18 seeing what cases survive general causation, as well as
19 seeing what types of cases are surviving the statute of
20 limitations motions, as well as the case-specific *Daubert*
21 challenges.

22 Certainly, Your Honor, we agree that that should
23 happen. Right? That's a point that they have raised, and
24 we're now conceding that. That said, we believe the
25 criteria of the number of cases, our position hasn't

1 changed. We think 24 cases is the right amount. They have
2 come back and said 10.

3 I think this issue is now ripe for Your Honor to
4 decide how many cases we should have, and then the parties
5 can work out a bellwether plan. Your Honor, second of all,
6 the idea that we are somehow trying to artificially limit
7 the pool, our point again was, the parties agreed that
8 there were only 30 cases that had sufficient plaintiff fact
9 sheets that were eligible for the first pool, and yes, we
10 picked up ultimately 11 of those, and only 4 remain.

11 So certainly, Your Honor, we agree. The entire
12 rest of the inventory that has brought peripheral
13 neuropathy only cases and naming either Avelox or Cipro or
14 Avelox and Cipro as the liable medication, we believe those
15 should be all subject to the workup now. Again, I think
16 they're making our point. Why would we ever want to go
17 back now and drill down further into those first 30 cases?
18 We picked 11 of them, and 7 of them haven't survived. It
19 doesn't seem like that is advancing the ball.

20 The biggest issue, Your Honor, seems to be this
21 notion that we are I don't want to say this word in quotes.
22 I don't believe it was the actual word, but the cantabile
23 of picking non PSC firms or certain firms here,
24 specifically The Sill Firm, Your Honor, I simply have to
25 talk about -- and the notion was raised that this is

1 something that has never been seen before.

2 Your Honor, I've never been involved in a
3 litigation where, with all due respect to Mr. Robins, he
4 has got only four cases in the entire litigation, and he's
5 a co-lead. I've got Mr. Nidel, who we have heard
6 complaints about his deposition conduct, he's got a single
7 case.

8 So whether Your Honor wants to hear arguments on
9 common benefit fund, that's not my point here, Your Honor.
10 Simply put, people should be working on their cases, not
11 being working towards a common benefit fund on behalf of
12 plaintiffs that they don't represent. We're talking about
13 case-specific workups here.

14 I'm not talking where people were involved in
15 working up company witnesses or general causation experts,
16 but to talk about The Sill Firm specifically, they had,
17 again I don't know the exact numbers, Your Honor, but I
18 believe it was over 250 cases were filed and then couldn't
19 satisfy the short form complaint. So certainly there is
20 reason for our clients to believe we should be working up
21 some of those cases.

22 I find it very hard to believe that with
23 approximately 80 cases they can't find two appropriate
24 cases from the plaintiffs to select and allow us to choose
25 from the other remaining 78 cases. If in fact that firm

1 that has 80 cases pending, more than twice as many than any
2 other firm, can't find two representative cases in any
3 bucket, then we've got serious MDL reform that we need to
4 be looking at, Your Honor.

5 Likewise, the idea that there is issues with non
6 PSC firms participating, we've had a pool that only had PSC
7 firms. So the idea that there is going to be a
8 representative pool and this is going to have value, there
9 certainly should be an opportunity for other people to be
10 involved in this process, both from the plaintiffs' side
11 but more importantly for our side.

12 We have a right to see what kind of cases are
13 being filed by which firms. If plaintiffs truly want us to
14 sit down and engage in some kind of discussion, we need to
15 see what the entire inventory looks like.

16 MR. SIMS: Briefly, Your Honor. Bayer defendants
17 had a chance to choose a non PSC case in round one, and
18 they didn't. So obviously it's not that critical of an
19 issue to them. Our issue isn't that they shouldn't choose
20 those cases. They're welcome to. That's why we have
21 defense picks. If they think they're important, they can
22 choose from them.

23 It is the notion of creating these arbitrary
24 categories that are completely divorced from the underlying
25 merits of the case. We think that is just an improper

1 system. That is not what the federal system intended for
2 when it created representative bellwether cases.

3 Again, Your Honor, I do think there may be some
4 middle ground here on some of these issues that may
5 benefit, but it does appear we are at a standstill in terms
6 of the numbers of cases. We do think 24 is excessive for a
7 second round of bellwethers in a group of cases that
8 numbers only 150, and most importantly, really we're
9 talking about many, many less given the criteria they're
10 using.

11 They're throwing out automatically a third of the
12 pending cases because they have Janssen. They're throwing
13 out a third because they deal with PN plus. So now we're
14 talking about a massive bellwether program for about 100
15 cases. We just don't think that's appropriate.

16 THE COURT: Anything else?

17 MR. SOLOW: Two things, Your Honor: I just want
18 to correct any misrepresentation. There was a single non
19 PSC case eligible in the initial pool of 34. So the notion
20 that we had an opportunity to select those kind of cases
21 and we chose not to pick that one case should not be now a
22 dispositive issue on how the Court is dividing that up.

23 Second of all, Your Honor, the notion that we
24 need the same number of cases, I think the proof is in the
25 putting, Your Honor. We had eleven cases, and we are now

1 down to four. We had an entire schedule. We were supposed
2 to brief selection of trials to determine which ones were
3 representative. We are only down to four.

4 There is only four left. So the idea that we're
5 going to now not learn from that and go down that process
6 again with the same number of cases just doesn't seem like
7 a, what we should be doing at this point, Your Honor.

8 MR. SIMS: I think this is it, Your Honor. I
9 didn't mean to suggest anything other than that there was
10 one case available and they chose not to pick it. Just as
11 I think a perfect illustration of the arbitrariness of
12 these restrictions, they want us to choose six non PSC
13 cases.

14 As of at least their earlier Power Point, there
15 were a total of eleven cases to pick from. So we are
16 taking 6 cases to represent 11, and meanwhile we are
17 ignoring 100 or 150 other cases through these arbitrary
18 date cutoffs and focusing solely on PN. We have to address
19 this larger pool of cases.

20 MR. SOLOW: Last one, Your Honor, I promise. We
21 saw what plaintiffs indicated about the number of available
22 cases. In fact, since that time, more plaintiffs have had
23 fully compliant and sufficient plaintiff fact sheets. That
24 pool is now up over 30. So the notion that there is not
25 enough simply just doesn't fly, Your Honor.

1 THE COURT: Okay. I do believe that we should
2 start a second round of bellwether selection. I think the
3 reduction in the number of cases suggests that we should
4 start that relatively soon. This is what I'm going to do:

5 For two weeks the parties should talk. If you
6 can reach an agreement on it within that period of time,
7 that's fine. After the two weeks, just send me a letter
8 that indicates the points of contention. It can be a joint
9 letter. You can send separate letters. Either way is
10 fine, and then I will resolve the remaining issues after
11 two weeks.

12 Okay?

13 MR. SIMS: Thank you, Your Honor.

14 MR. SOLOW: Thank you, Your Honor.

15 THE COURT: All right. That would be two weeks
16 from I guess Friday of this week. How is that? Okay.

17 Okay. Let's see. There are motions to withdraw
18 in two cases. Anything you want to say about that? Is it
19 the Buch case and the Slaven case?

20 MR. SIMS: Slaven case, yes, Your Honor. I don't
21 think it's the Buch case -- oh, it is, yes. B-u-c-h, yes.
22 Thank you, Your Honor.

23 No, Your Honor. This is two cases amongst a much
24 larger, larger, larger group that participated in the
25 settlement with Janssen, and we just can't see eye to eye

1 on those.

2 THE COURT: Okay. All right. I don't know that
3 I need to hear more for that. We will grant those right
4 away.

5 MR. SIMS: Your Honor?

6 THE COURT: Yes.

7 MR. SIMS: Simply as a courtesy heads up, I
8 believe we have three clients who were eligible for the
9 earlier settlement with Janssen who we just cannot locate.
10 We have hired a private investigator, and we have just
11 exhausted our options. So we will be filing motions to
12 withdraw on those three.

13 THE COURT: All right. Sometimes you just can't
14 find people.

15 All right. Let's see. We are talking about a
16 next status conference. It probably should be, should
17 coincide with maybe at the same time as the *Daubert*
18 hearing, or do you want one before that?

19 MR. SIMS: No, Your Honor. The only reason we
20 discussed an earlier hearing would be for argument on this
21 case-specific expert issue, but as the Court indicated, we
22 can just simply do that on the briefs.

23 THE COURT: All right. Is that okay with you,
24 Mr. Solow?

25 MR. SOLOW: Yes, Your Honor.

1 THE COURT: Okay. We will do that in connection
2 with the *Daubert* hearing, whatever day is selected on that.
3 Heather is back I believe Monday afternoon next week, and
4 she will start working on that with you, that timing.
5 Okay. Anything else from anyone on the telephone?

6 Okay. Anything else here that we need to discuss
7 today?

8 MR. SIMS: No, Your Honor.

9 MR. SOLOW: No, Your Honor.

10 THE COURT: Okay. Thank you. We will be in
11 recess, and we will look forward to receiving submissions
12 in the next few weeks and seeing you in September. The
13 Court is in recess. Thank you.

14 THE CLERK: All rise.

15 **(Court was adjourned.)**

16 * * *

17 I, Kristine Mousseau, certify that the foregoing
18 is a correct transcript from the record of proceedings in
19 the above-entitled matter.

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23 Certified by: s/ Kristine Mousseau, CRR-RPR
24 Kristine Mousseau, CRR-RPR

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